U.S. Department of Labor

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Issue date: 23Jan2001

Case No: 1999-BLA-1104

In the Matter of

LUTHER MCINTOSH

Claimant

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

Respondent

APPEARANCES:

Tammie Jones Sivalls, Esq.
HALE & SIVALLS
Mt. Sterling, Kentucky
For Claimant

Heather A. Joys, Esq.
U.S. Department of Labor,
Office of the Solicitor
Cleveland, Ohio
For the Director

BEFORE: RUDOLF L. JANSEN
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended. 30 U.S.C. § 901 *et seq.* Under the Act, benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Surviving dependents of coal miners whose deaths were caused by pneumoconiosis also may recover benefits.

Pneumoconiosis, commonly known as black lung, is defined in the Act as "a chronic dust disease of the lung and its sequelae, including pulmonary and respiratory impairments, arising out of coal mine employment." 30 U.S.C. § 902(b).

On June 28, 1999, this case was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held in Hazard, Kentucky on September 19, 2000. The findings of fact and conclusions of law that follow are based upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. They also are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing. Although perhaps not specifically mentioned in this decision, each exhibit received into evidence has been reviewed carefully, particularly those related to the Claimant's medical condition. The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. References to "DX" and "CX" refer to the exhibits of the Director and Claimant, respectively. The transcript of the hearing is cited as "Tr." and by page number.

ISSUES

1. Whether the evidence establishes a material change in conditions pursuant to Section 725.309(d);

2. The length of Claimant's coal mine employment;

3. Whether Claimant's pneumoconiosis arose out of coal mine employment;

4. Whether Claimant is totally disabled; and

5. Whether Claimant's disability is due to pneumoconiosis;

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background and Procedural History

Claimant, Luther McIntosh, was born on May 3, 1930. Claimant married Letha Barrett on July 11, 1950, and they reside

together. On his application for benefits, Claimant alleged that he has one dependent child, Lee McIntosh. (DX 01)

Mr. McIntosh has complained of chest pains and coughing, and feels that he has the effects of a smothering condition. Although he makes no assertion regarding his smoking history, medical reports indicate a smoking history of two packages of cigarettes per day. A 1998 examination report notes that Claimant began smoking at twelve, while a 1999 medical review report notes a history of greater than forty years. (DX 09, 18) Based upon these reports I find a smoking history of two packages of cigarettes per day for fifty-six years.

Claimant filed his application for black lung benefits on January 9, 1998. The Office of Workers' Compensation Programs denied the claim on May 6, 1998, and, after reviewing additional evidence, affirmed its denial on January 21, 1999 and June 7, 1999. Pursuant to Claimant's request for a formal hearing, the case was transferred to the Office of Administrative Law Judges for a formal hearing. (DX 16)

Coal Mine Employment

The duration of a miner's coal mine employment is relevant to the applicability of various statutory and regulatory presumptions. Claimant bears the burden of proof in establishing the length of his coal mine work. *See, Shelesky v. Director, OWCP*, 7 BLR 1-34, 1-36 (1984); *Rennie v. U.S. Steel Corp.*, 1 BLR 1-859, 1-862 (1978). On his application for benefits, Claimant alleged seven and one half years of coal mine employment. The evidence in the record includes a Social Security Statement of Earnings encompassing the years 1946 to 1973, applications for benefits, affidavits from co-workers, and Claimant's testimony. (DX 01, 20).

The Act fails to provide specific guidelines for computing the length of a miner's coal mine work. However, the Benefits Review Board consistently has held that a reasonable method of computation, supported by substantial evidence, is sufficient to sustain a finding concerning the length of coal mine employment. *See, Croucher v. Director, OWCP*, 20 BLR 1-67, 1-72 (1996) (en banc)*; Dawson v. Old Ben Coal Co.*, 11 BLR 1-58, 1-60 (1988); *Niccoli v. Director, OWCP*, 6 BLR 1-910, 1-912 (1984). Thus, a finding concerning the length of coal mine employment may be based on many different factors, and one particular type of

evidence need not be credited over another type of evidence. *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-9 (1985).

Provided in the record is an Itemized Statement of Earnings from the Social Security Administration. (DX 20) This document demonstrates that Mr. McIntosh's coal mine employment spanned the years from 1948 to 1960, but totaled only fourteen quarters of work. It specifically shows that Claimant worked at: Carrs Fork Coal Company, Inc., for three quarters in 1948; Kentucky River Colliers, Inc., for one quarter in 1953, two quarters in 1954, and one quarter in 1955; Moses Elkins Mining Company for three quarters in 1956; Wesley Conley, et al., Coal Company for two quarters in 1958 and one quarter in 1959; and Liberty Coal Company for one quarter in 1960.

Also contained within the record are affidavits of Oscar Barrett, Shade Barrett, and Edgar Barrett, who are Claimant's brothers-in-law, stating that Claimant worked with them in Perry County coal mines from 1948-1950. (DX 20) An affidavit of Mr. McIntosh's uncle, Sam McIntosh, states that Claimant worked in Leslie County coal mines from 1960-1963. (DX 20) Mr. McIntosh also asserts on his Coal Mine Employment Form CM-911a that he worked at Carrs Fork Coal Mine Company from 1945-1947, Kentucky Mountain Coal Company from 1947-1950,and Yance Amos Coal Company from 1950-1952. (DX 02) The record includes an affidavit of Yancy Amos, timekeeper and co-owner of Amos & Amos Coal Company, wherein he stated that Mr. McIntosh had worked in underground coal mines from 1951-1959, but does not state whether Mr. McIntosh worked on a continuous basis. (DX 20)

Finally, Mr. McIntosh testified that he worked at Amos & Amos Coal Company from 1951-1959. (Tr. 19) He stated that Amos & Amos, Moses Elkins, and Carrs Fork mines were in Perry County. (Tr. 14) He also testified, as evidence of his employment during periods not contained in the social security records, that had he not been working on a continuous basis he would not have been able to support his family. (Tr. 24)

Mr. McIntosh asserts on his Form CM-911a that he worked for Carrs Fork Coal Company from 1945-1947, however the social security records indicate that he worked for Carrs Fork for three quarters in 1948 only. Additionally, he presents affidavits from his brothers-in-law stating that he worked with them in coal mines located in Perry County from 1948-1950. According to his testimony, however, the Perry County mines with which he was employed were Carrs Fork, Amos & Amos, and Moses

Elkins, none of which he worked for during 1949 and 1950. There is no evidence to show which coal mines Claimant worked for from the latter half of 1948 through 1950, nor what quarters he was employed. I may rely on SSA records to establish length of coal mine employment, especially where testimony is unclear. ***Brumley v. Clay Coal Corp.***, 6 BLR 1-956 (1984); ***Tackett v. Director, OWCP***, 6 BLR 1-839 (1984). Accordingly, I find that pursuant to the social security records, Claimant was employed as a coal miner for three quarters in 1948, but at no other time between 1945 and 1950.

Claimant asserted during the hearing that from 1951 through 1959, he was employed with Amos & Amos Coal Company. The social security records indicate that he had been employed with other coal companies for ten quarters during that period. The affidavit of Yancy Amos demonstrates that Mr. McIntosh did work for Amos & Amos during this period, but does not establish which quarters he was employed. Claimant bears the burden of proof in establishing the length of his coal mine work. ***Shelesky,*** 7 BLR 1-36; ***Rennie,*** 1 BLR 1-862. The testimony of co-workers may be discounted because of failure to state that miner worked continuously with them. ***Tackett, supra***. Without an indication as to the number of quarters worked, this evidence presented in favor of continuous employment from 1951 to 1959 is entitled to less weight. Further, Mr. McIntosh indicated on his Form CM-911a that he worked for Yance Amos Coal Mining from 1950 to 1952 only. Due to inconsistent evidence, I find in accordance with the social security records that Mr. McIntosh had ten quarters of coal mine employment for the years 1951 through 1959. See, ***Brumley, supra***; ***Tackett, supra***.

Mr. McIntosh presents an affidavit from his uncle, Sam McIntosh, showing that he worked in Leslie County coal mines from 1960-1963. (DX 20) The social security records indicate that Claimant worked for one quarter in 1960 at Liberty Coal Company. Mr. McIntosh has testified that he was paid cash by Amos & Amos Coal Company in Perry County, but provides no explanation for the absence of social security records from 1960 to 1963 in Leslie County. Therefore, I find that Mr. McIntosh worked one quarter in 1960. See, ***Id***.

Based upon Claimant's social security records and other consistent evidence, I find that Mr. McIntosh has fourteen quarters, or three and one half years of qualifying coal mine employment. During his coal mining history, Mr. McIntosh worked as a general laborer, hauling coal from the mines on ponies.

(DX 02, Tr. 13, 22) As a general laborer, Claimant was exposed to coal dust. (DX 02)

Duplicate Claim

Claimant's previous claim for benefits was denied on February 28, 1992. As a result, the claim involved in this proceeding, filed on January 9, 1998, constitutes a "duplicate claim" under the regulations. The provisions of Section 725.309(d) apply to duplicate claims and are intended to provide relief from the traditional notions of *res judicata*. Under Section 725.309(d), duplicate claims "must be denied on the grounds of the prior denial unless the evidence demonstrates "a material change in conditions." 20 C.F.R. § 725.309(d). The United States circuit courts of appeals have developed divergent standards to determine whether "a material change in conditions" has occurred. Because Claimant last worked as a coal miner in the state of Kentucky, the law as interpreted by the United States Court of Appeals for the Sixth Circuit applies to this claim. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989).

Under the Sixth Circuit's approach, an administrative law judge must consider all of the new evidence, both favorable and unfavorable, to determine whether it proves at least one of the elements of entitlement that formed the basis for the prior denial. If the new evidence establishes the existence of one of these elements, it will demonstrate a material change in conditions as a matter of law. Then, the administrative law judge must consider whether all the evidence of record, including evidence submitted with the prior claims, supports a finding of entitlement to benefits. *Sharondale Corp. v. Ross*, 42 F.3d 993, 997-98 (6th Cir. 1994). See *Lisa Lee Mines v. Director, OWCP,* 86 F.3d 1358, 1363 (4th Cir. 1996).

In the denial of Claimant's prior claim, the Director determined that the evidence established the presence of pneumoconiosis, but failed to establish pneumoconiosis arising out of coal mine employment and total disability. If the newly-submitted evidence establishes one of these elements, it will demonstrate a material change in conditions. Then, I must review the entire record to determine entitlement to benefits. See *Ross*, 42 F.3d at 997-98; *Caudill v. Arch of Kentucky, Inc.*, BRB 98-1502 BLA (Sept. 29, 2000).

MEDICAL EVIDENCE[1]

X-ray reports

Exhibit	Date of X-ray	Date of Reading	Physician/ Qualifications	Interpretation
DX 09	01-23-98	01-23-98	Wicker / B	Negative
DX 09	01-23-98	02-24-98	Sargent / BCR, B	1/0
DX 09	01-23-98	03-04-98	Barrett / BCR, B	1/2
DX 09	01-23-98	04-13-98	Goldstein / B	1/0
DX 18	12-07-98	12-07-98	Sundaram / unknown	1/1
DX 22	10-11-91	11-22-91	Sargent / BCR, B	1/0
DX 22	10-11-91	10-11-91	Wicker / No qualifications	2/1
DX 21	08-22-88	09-16-88	Sargent / BCR, B	0/1, negative
DX 21	08-22-88	09-01-88	Illegible / BCR, B	negative
DX 21	08-22-88	08-22-88	Williams / No qualifications	negative
DX 20	10-08-73	07-05-75	Cole / B	0/0, negative
DX 20	10-08-73	10-16-73	Lane / unknown	1/0

"BR" denotes a "B" reader and "BCR" denotes a board-certified radiologist. A "B" reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successfully completing an examination conducted by or on behalf of the Department of Health and Human Services (HHS). A board-certified radiologist is a physician who is certified in radiology or diagnostic roentgenology by the American Board of Radiology or the American Osteopathic Association. See 20 C.F.R. § 718.202(a)(ii)(C). The qualifications of physicians are a matter of public record at the National Institute of Occupational Safety and Health reviewing facility at Morgantown, West Virginia.

Pulmonary Function Studies

[1] Initially, my inquiry in this matter is whether Mr. McIntosh's condition has changed since the previous denial of his claim on February 28, 1992.

Exhibit/ Date	Physician	Age/ Height	FEV_1	FVC	MVV	FEV_1 / FVC	Tracings	Comments
DX 09 01-23-98	Wicker	67 / 64	1.16	1.95	41.74	60	Yes	Understanding good, Cooperation fair at best; invalid MVV
			1.31*	2.18*	40.43*	60		
DX 09 03-10-98	Wicker	67 / 64	1.07	2.00	44.07	54	Yes	invalid MVV
DX 18 12-07-98	Sundaram	68 / 65	1.17	1.97	39	59	Yes	
DX 22 10-11-91	Wicker	61 / 65	1.68	2.73	68	61	Yes	Cooperation fair, Understanding good
			1.57*	2.51*	70*	62*		
DX 21 08-22-88	Williams	58 / 65	1.12	2.36	59	47	Yes	Test invalid, Sub-maximal effort
			1.67*	2.67*	71*	62*		
DX 20 10-17-73	Lane	Unknown	2.25	3.2	91.3	70	Yes	Mild restrictive defect

*post-bronchodilator values

The January 23, 1998 pulmonary function study was reviewed on February 21, 1998, by Nausherwan Khan Burki, M.D. Dr. Burki noted observer comments and the shapes of the curves indicated in the tracings. He opined that the test was invalid as a measure of pulmonary function.

Dr. Burki also evaluated the December 7, 1998 pulmonary function study. In his January 14, 1999 evaluation, he noted that the paper speed on the equipment was too slow. Based upon this fact, Dr. Burki opined that the test was invalid. Dr. Burki is Board Certified in Internal Medicine and Pulmonary Disease.

The March 10, 1998 pulmonary function study was evaluated on March 30, 1998, by Mohammed I. Ranavaya, M.D. Dr. Ranavaya opined that the test was invalid as a measure of pulmonary function due to sub-optimal effort, cooperation, and comprehension.

Arterial Blood Gas Studies

Exhibit	Date	pCO_2	pO_2	Resting/ Exercise
DX 09	01-23-98	36	82.1	Resting
		36.3	96.3	Exercise
DX 22	10-11-91	41.2	80.3	Resting
		41.3	79.9	Exercise
DX 21	08-22-88	43.4	86.9	Resting
		41.7	88.6	Exercise

Narrative Medical Evidence

Mr. McIntosh was examined on August 16, 1975, by J.L. Becknell, M.D. (DX 20) Based upon a fifteen year coal mine employment history and a physical examination, Dr. Becknell opined that Claimant did not have pneumoconiosis, and suffered no impairment due to pneumoconiosis. Dr. Becknell's credentials are not of record.

On August 22, 1988, Claimant was examined by Cordell H. Williams, M.D. (DX 21) Dr. Williams noted a fifteen year coal mining history and a one and one half package per day smoking history since 1942. He reviewed pulmonary function studies, arterial blood gas studies, x-rays, and physically examined Mr. McIntosh. Based upon this information he opined that Claimant did not have pneumoconiosis, but was suffering from a pulmonary tuberculosis. Dr. Williams did not opine as to impairment, nor are his credentials contained within the record.

In a letter dated September 14, 1988, Price Sewell, M.D. opined that Mr. McIntosh was suffering from coal workers' pneumoconiosis and chronic pulmonary disease. (DX 21) He based this diagnosis on a fifteen year coal mine employment history and a two package per day cigarette smoking history of greater than forty years. Dr. Sewell further opined that Claimant is totally unable to work any job. Dr. Sewell was Claimant's treating physician but his credentials are not of record.

On October 11, 1991, Claimant was examined by Mitchell Wicker, Jr., M.D. (DX 22) Dr. Wicker reviewed x-rays, pulmonary function studies, arterial blood gas studies, an EKG, and physically examined Mr. McIntosh. Noting a smoking history of one to two packages of cigarettes per day since 1950, and a coal mining history of shoveling coal, he opined that Claimant had pneumoconiosis and chronic obstructive pulmonary disease, both caused by coal dust exposure. He further opined that Mr. McIntosh is totally disabled due to his COPD.

Mr. McIntosh was examined on January 23, 1998, by Dr. Wicker. (DX 09) Dr. Wicker again reviewed x-rays, a pulmonary function study, arterial blood gas study, and an EKG. He also noted a one year coal mining history and a two package per day smoking history of fifty-six years. Dr. Wicker opined that Mr. McIntosh does not have pneumoconiosis, observing that the x-rays show no evidence of pneumoconiosis. He further opined that Claimant suffers from no occupational lung disease caused by coal mine employment. Upon reviewing the pulmonary function study and arterial blood gas, he stated that he was unable to determine a level of impairment due to sub-optimal effort. Dr. Wicker's credentials are not of record.

On December 7, 1998, Mr. McIntosh was examined by Raghu Sundaram, M.D. (DX 18) Dr. Sundaram reviewed x-rays and a pulmonary function study, and noted a twelve year underground coal mine employment, an eleven year saw mill employment and a one to two package per day smoking history for an unspecified amount of time. Based upon this information, Dr. Sundaram opined that Claimant has coal workers' pneumoconiosis, caused by prolonged exposure to coal dust. He further opined that Mr. McIntosh is totally disabled due to his shortness of breath with limited activity. Dr. Sundaram's credentials are not of record.

In a report dated May 9, 1999, Bruce C. Broudy, M.D., reviewed Claimant's medical records, including x-rays, pulmonary function studies, arterial blood gas studies, and the reports from physical examinations. He noted that the record showed coal mine histories of between seven and one half to fifteen and one half years, but he relied upon a three and one half year history. He also noted that Mr. McIntosh smoked two packages of cigarettes per day for more than forty years. He opined that Mr. McIntosh has chronic obstructive pulmonary disease caused by cigarette smoking, but not coal workers' pneumoconiosis. Dr. Broudy further opined that Mr. McIntosh is totally disabled due to a pulmonary impairment, but that the impairment is as a

result of chronic obstructive airways disease caused by cigarette smoking. Dr. Broudy's credentials are not of record.

DISCUSSION AND APPLICABLE LAW

Because Claimant filed his application for benefits after March 31, 1980, this claim shall be adjudicated under the regulations at 20 C.F.R. Part 718. I must consider all of the new evidence, both favorable and unfavorable, to determine whether it proves at least one of the elements of entitlement that formed the basis for the prior denial. In this case, the Director found that Mr. McIntosh does have pneumoconiosis, but that he has failed to demonstrate that the condition arose out of coal mine employment or that it is totally disabling. Therefore, to establish a material change in conditions, Claimant must demonstrate at least one of the elements previously adjudicated against him. See, ***Ross, supra; Caudill, supra***.

NEWLY SUBMITTED EVIDENCE

Causation of Pneumoconiosis

Twenty C.F.R. § 718.203(a) provides that eligibility for benefits under the Act requires a determination that the miner's pneumoconiosis arose at least in part out of coal mine employment. The District Director found that Mr. McIntosh suffered from pneumoconiosis, but that the pneumoconiosis did not arise from coal mine employment. Twenty C.F.R. § 718.203(b) creates a rebuttable presumption that pneumoconiosis present in a miner who was employed for more than ten years arose out of that coal mine employment. In the instant case, I have found that Mr. McIntosh was a miner for three and one half years, and is therefore not entitled to the rebuttable presumption of causation.

If a miner suffers from pneumoconiosis and was employed less than ten years in the Nation's coal mines, it shall be determined that such pneumoconiosis arose out of that employment only if competent evidence establishes such a relationship. 20 C.F.R. § 718.203(c). ***See also Stark v. Director, OWCP***, 9 B.L.R.

1-36 (1986); *Hucker v. Consolidation Coal Co.*, 9 B.L.R. 1-137 (1986). Specifically, the burden of proof is met under § 718.203(c) when competent evidence establish[es] that his pneumoconiosis arose "in part" from his coal mine employment. *See, Southard v. Director, OWCP*, 732 F.2d 66, 6 B.L.R. 2-26 (6th Cir. 1984). The record must contain medical evidence establishing the relationship between pneumoconiosis and coal mine employment.

Dr. Sundaram examined Mr. McIntosh and determined that he had coal workers' pneumoconiosis. He specifically noted that Claimant developed pneumoconiosis due to prolonged exposure to coal dust. He based this finding on an indeterminate smoking history and a twelve year coal mine employment history, more than three times longer than the evidence has shown. Medical opinions which are predicated upon an erroneous coal mine employment history may be given less weight with regard to etiology of the miner's disease. *Barnes v. Director, OWCP*, 19 B.L.R. 1-71 (1995)(en banc on reconsideration). Dr. Sundaram's opinion is based upon an unknown smoking history and an employment history far in excess of what the evidence demonstrates. His opinion is inadequately documented and is therefore entitled to less weight.

Dr. Wicker examined Claimant and determined that he did not suffer from pneumoconiosis, stating that Mr. McIntosh did not have an occupationally related lung disease caused by coal mine employment. Dr. Wicker based his opinion on a one year coal mining history, a period only slightly shorter than that which the evidence demonstrates. Therefore, he has adequately documented his opinion regarding pneumoconiosis and causation, citing Claimant's work and social histories and medical evidence upon which he relied. See, *Barnes*.

Dr. Broudy opined that Mr. McIntosh does not have coal workers' pneumoconiosis, but that he suffers from chronic obstructive airways disease. He attributes this disease to Claimant's cigarette smoking history. Dr. Broudy's opinion is very well documented as to work history, smoking history, and the medical evidence which he considered in arriving at his opinion. Therefore his opinion is entitled to greater weight.

Mr. McIntosh bears the burden of demonstrating by a preponderance of the evidence that a material change in conditions has occurred. In weighing the newly submitted

evidence together, I find that Claimant has not demonstrated by a preponderance of the evidence that his pneumoconiosis arose from coal mine employment, and accordingly does not constitute a material change in conditions as contemplated by section 725.309(d).

Total Disability

A miner is considered totally disabled when his pulmonary or respiratory condition prevents him from performing his usual coal mine work or comparable work. 20 C.F.R. § 718.204(b)(2). Non-respiratory and non-pulmonary impairments have no bearing on a finding of total disability. *See Beatty v. Danri Corp.*, 16 BLR 1-11, 1-15 (1991). Section 718.204(c) provides several criteria for establishing total disability. Under this section, I first must evaluate the evidence under each subsection and then weigh all of the probative evidence together, both like and unlike, to determine whether Claimant has established total respiratory disability. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1987).

Under Sections 718.204(c)(1) and (c)(2), total disability may be established with qualifying pulmonary function studies or arterial blood gas studies. A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values found in Appendices B and C of Part 718. *See* 20 C.F.R. § 718.204(c)(1), (c)(2). A "non-qualifying" test produces results that exceed the table values.

Mr. McIntosh performed a pulmonary function study on January 23, 1998. The FEV1 value and MVV value were both below those values prescribed in the regulations at §718 Appendix B. Both the administering physician, Dr. Wicker, and the reviewing physician, Dr. Burki, opine that the MVV values obtained were invalid due to sub-optimal effort. At that time, Claimant also performed an arterial blood gas study. This study produced non-qualifying results.

Mr. McIntosh again performed a pulmonary function study on March 10, 1998. He again produced FEV1 and MVV values below those prescribed at § 718 Appendix B. He also produced an FEV1/FVC ratio less than that prescribed at §718.204(c)(1)(iii). Again both the administering physician, Dr. Wicker, and the

reviewing physician, Dr. Ranavaya, opined that Claimant gave sub-optimal effort, rendering the results invalid.

Mr. McIntosh performed a third pulmonary function study on December 7, 1998. He produced FVC, FEV1, and MVV values below those prescribed in the regulations. Dr. Burki reviewed the results of this study and determined that the paper speed on the instrument used was too slow, rendering the results invalid.

Section 718.204(c)(3) provides that a claimant may prove total disability through evidence establishing cor pulmonale with right-sided congestive heart failure. This section is inapplicable to this claim because the record contains no such evidence.

Under Section 718.204(c)(4), total disability may be established if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a respiratory or pulmonary impairment prevents the miner from engaging in his usual coal mine work or comparable and gainful work.

Contained within the newly submitted evidence are opinions of Drs. Broudy, Sundaram, and Wicker, addressing Claimant's degree of impairment. Dr. Wicker states that he is unable to determine Mr. McIntosh's level of impairment due to sub-optimal effort in the pulmonary function studies. He, therefore, makes no comment regarding the cause of any impairment that Mr. McIntosh may have. Both Drs. Sundaram and Broudy opine that Mr. McIntosh is totally disabled from a respiratory standpoint. These physicians opine differently with regards to the cause of the disability, Dr. Broudy attributing the disability to cigarette smoking and Dr. Sundaram citing prolonged exposure to coal dust as the cause.

In weighing all the medical evidence together, I am presented with invalid pulmonary function studies, a non-qualifying arterial blood gas study and two medical opinions stating affirmatively that Mr. McIntosh is totally disabled from a respiratory standpoint. The newly submitted evidence does not contain a medical opinion stating that Mr. McIntosh is not totally disabled. It is Mr. McIntosh's burden to demonstrate by a preponderance of the evidence that he is totally disabled. *Mazgaj v. Valley Camp Coal Co.*, 9 B.L.R. 1-201, 1-204 (1986). Dr. Broudy's opinion is well documented and reasoned. Dr. Sundaram's opinion is not well documented, and is entitled to

less weight, but none-the-less agrees with Dr. Broudy's conclusion regarding total disability. I find that Dr. Broudy's opinion, bolstered by Dr. Sundaram's opinion sufficiently outweighs Claimant's non-qualifying pulmonary function studies and arterial blood gas studies, demonstrating by a preponderance of the evidence that Mr. McIntosh is totally disabled from a respiratory standpoint. This finding constitutes a material change in conditions warranting full review of the record. *Ross*, 42 F.3d 997-98.

FULL REVIEW OF THE RECORD

Pneumoconiosis

Under the Act, "'pneumoconiosis' means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b). Section 718.202(a) provides four methods for determining the existence of pneumoconiosis. Under Section 718.202(a)(1), a finding of pneumoconiosis may be based upon x-ray evidence. In evaluating the x-ray evidence, I assign heightened weight to interpretations of physicians who qualify as either a board-certified radiologist or "B" reader. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985). I assign greatest weight to interpretations of physicians with both of these qualifications. *See Woodward v. Director, OWCP*, 991 F.2d 314, 316 n.4 (6th Cir. 1993); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984).

The evidence of record contains twelve interpretations of five chest x-rays. Of these interpretations, five were negative for pneumoconiosis while seven were positive. Of the negative interpretations, two were made by B readers, two by dually qualified readers and one by a physician with neither qualification. One of the physicians listed as dually qualified and interpreting the x-ray as negative cannot be determined due to an illegible signature and an incomplete form. I therefore assign that interpretation less weight. Of the positive interpretations, there were three interpretations by dually qualified physicians, one by a B reader, and three made by physicians without qualifications, or of unknown qualifications.

I also note that all but one interpretation after 1988 is positive for pneumoconiosis, while interpretations from 1973 to

1988 are all negative but one. Because pneumoconiosis is a progressive and irreversible disease, it may be appropriate to accord greater weight to the most recent evidence of record especially where a significant amount of time separates the newer from the older evidence. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc); *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). Specifically, Dr. Sargent interprets the x-ray in 1988 as a 0/1, while in 1991 and 1998 he interprets the x-rays as 1/0.

The only negative interpretation with regards to post-1988 x-rays is Dr. Wicker, a B reader, who in 1988 interpreted the x-ray as a category 2 profusion. It is proper to accord little probative value to a physician's opinion which is inconsistent with his or her earlier report or testimony. *Hopton v. U.S. Steel Corp.*, 7 B.L.R. 1-12 (1984); *Surma v. Rochester & Pittsburgh Coal Co.*, 6 B.L.R. 1-799 (1984). Here, Dr. Wicker has vastly inconsistent interpretations without explanation as to the reason for the inconsistency. Therefore, I give his interpretations little weight.

Because the positive readings constitute the majority of recent interpretations and are verified by more highly-qualified physicians, I find that the x-ray evidence supports a finding of pneumoconiosis.

Under Section 718.202(a)(2), a claimant may establish pneumoconiosis through biopsy evidence. This section is inapplicable to this claim because the record contains no such evidence.

Under Section 718.202(a)(3), a claimant may prove the existence of pneumoconiosis if one of the presumptions at Sections 718.304 to 718.306 applies. Section 718.304 requires x-ray, biopsy, or equivalent evidence of complicated pneumoconiosis. Because the record contains no such evidence, this presumption is unavailable. The presumptions at Sections 718.305 and 718.306 are inapplicable because they only apply to claims that were filed before January 1, 1982, and June 30, 1982, respectively. Because none of the above presumptions apply to this claim, Claimant has not established pneumoconiosis pursuant to Section 718.202(a)(3).

Section 718.202(a)(4) provides that a claimant may establish the presence of pneumoconiosis through a reasoned medical opinion. The records contain medical opinions spanning twenty-

four years. Dr. Wicker opines on October 11, 1991, that Mr. McIntosh is suffering from both pneumoconiosis and chronic obstructive pulmonary disorder both caused by exposure to coal dust. On January 23, 1998, Dr. Wicker reviews the record and physically examines Mr. McIntosh and opines that he has no occupationally related lung disease. Dr. Wicker does not provide an explanation for his change of opinion, entitling his opinions to little weight. *Hopton, supra; Surma, supra*.

A "documented" opinion is one that sets forth the clinical findings, observations, facts, and other data upon which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987). An opinion may be adequately documented if it is based on items such as a physical examination, symptoms, and the patient's work and social histories. *Hoffman v. B&G Construction Co.*, 8 B.L.R. 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 B.L.R. 1-295 (1984); *Justus v. Director, OWCP*, 6 B.L.R. 1-1127 (1984).
Drs. Sewell and Sundaram opine that Mr. McIntosh has pneumoconiosis. Dr. Sewell's opinion, however, is in letter form and does not document the evidence that he used to evaluate Claimant's condition, and is based upon an erroneous work history. Without adequate documentation, his opinion is entitled to less weight. *Clark,* 12 B.L.R. 1-149. Dr. Sundaram's opinion is also based upon an erroneous work history and is therefore not well documented, and entitled to diminished weight. *Id.*

Drs. Broudy and Williams opine that Mr. McIntosh does not have pneumoconiosis. Dr. Williams bases his opinion upon an erroneous coal mine employment history, entitling it to diminished weight. *Id.* I find Dr. Broudy's opinion, however, adequately documented and well reasoned, noting a proper coal mine history and social history and citing to the evidence which he reviewed in arriving at his opinion. Dr. Broudy based his diagnosis, in part, on a negative interpretation of the x-ray evidence.

In weighing the medical evidence with regards to whether Mr. McIntosh has pneumoconiosis I am faced with radiological evidence consistent with pneumoconiosis, and medical opinions inconsistent with pneumoconiosis. Drs. Sargent and Barrett are Board Certified in Radiology and are highly qualified in the interpretation of x-rays. Dr. Broudy's credentials with respect to his qualifications to interpret x-rays are not present in the

record, and he bases his opinion in part on x-rays which he notes as negative for coal workers' pneumoconiosis. I therefore give the positive x-ray interpretations from the dually qualified physicians more weight and find that Mr. McIntosh has pneumoconiosis.

Causation of Pneumoconiosis

If a miner suffers from pneumoconiosis and was employed less than ten years in the Nation's coal mines, it shall be determined that such pneumoconiosis arose out of that employment only if competent evidence establishes such a relationship. 20 C.F.R. § 718.203(c). *See also Stark v. Director, OWCP*, 9 B.L.R. 1-36 (1986); *Hucker v. Consolidation Coal Co.*, 9 B.L.R. 1-137 (1986). Specifically, the burden of proof is met under §§ 718.203(c) when competent evidence establish[es] that his pneumoconiosis arose "in part" from his coal mine employment. *See Stomps v. Director, OWCP*, 816 F.2d 1533, 10 B.L.R. 2-107 (11th Cir. 1987); *Southard v. Director, OWCP*, 732 F.2d 66, 6 B.L.R. 2-26 (6th Cir. 1984). The record must contain medical evidence establishing the relationship between pneumoconiosis and coal mine employment.

Drs. Sewell, Sundaram, and Wicker are the only physicians opining that Claimant's pneumoconiosis arose from prolonged coal dust exposure. Dr. Wicker's opinion is entitled to little weight due the unexplained inconsistencies with his later opinion that Mr. McIntosh does not suffer from an occupational lung disease caused by coal mine employment. *Hopton, supra; Surma, supra*. Drs. Sewell and Sundaram's opinions are entitled to less weight due to inadequate documentation. *Clark, supra*. Drs. Broudy and Williams opined that Claimant does not have coal workers' pneumoconiosis, and are therefore silent on the etiology of the disease.

Mr. McIntosh has demonstrated that his pneumoconiosis arose out of his coal mine employment through the presentation of the medical opinions of Drs. Sewell and Sundaram. Although these opinions are entitled to less weight, the two opinions that Mr. McIntosh's pneumoconiosis was caused by coal dust exposure are uncontested. Therefore Claimant has demonstrated by a preponderance of the evidence that his pneumoconiosis arose out of his coal mine employment.

Total Disability Due to Pneumoconiosis

A miner is considered totally disabled when his pulmonary or respiratory condition prevents him from performing his usual coal mine work or comparable work. 20 C.F.R. § 718.204(b)(2). Non-respiratory and non-pulmonary impairments have no bearing on a finding of total disability. *See Beatty v. Danri Corp.*, 16 BLR 1-11, 1-15 (1991). Section 718.204(c) provides several criteria for establishing total disability. Under this section, I first must evaluate the evidence under each subsection and then weigh all of the probative evidence together, both like and unlike, to determine whether Claimant has established total respiratory disability. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1987).

Under Sections 718.204(c)(1) and (c)(2), total disability may be established with qualifying pulmonary function studies or arterial blood gas studies. A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values found in Appendices B and C of Part 718. *See* 20 C.F.R. § 718.204(c)(1), (c)(2). A "non-qualifying" test produces results that exceed the table values. Mr. McIntosh failed to produce a qualifying arterial blood gas study, or a valid qualifying pulmonary function study.

Section 718.204(c)(3) provides that a claimant may prove total disability through evidence establishing cor pulmonale with right-sided congestive heart failure. This section is inapplicable to this claim because the record contains no such evidence.

Under Section 718.204(c)(4), total disability may be established if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a respiratory or pulmonary impairment prevents the miner from engaging in his usual coal mine work or comparable and gainful work. In this case, five physicians have rendered opinions as to Mr. McIntosh’s level of impairment.

Dr. Wicker examines Claimant on two separate occasions, in 1991 and 1998. In 1991, upon physical examination and review of non-qualifying studies of pulmonary function and arterial blood gases, he opines that Mr. McIntosh is totally disabled. In 1998, upon physical examination and review of non-qualifying studies of pulmonary function and arterial blood gases, he opines that he is unable to determine a level of impairment due

to sub-optimal effort. I find these opinions to be inconsistent and therefore entitled to little weight. See, *Surma, supra*.

Dr. Becknell opined on August 16, 1975, that Mr. McIntosh was not impaired due to pneumoconiosis. This diagnosis was made twenty-five years ago, and the progressive nature of pneumoconiosis has been recognized by the courts. *See* Decision and Order 8-9; *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987) *reh'g denied*, 484 U.S. 1047 (1988); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 3 BLR 2-36 (1976). Further, Dr. Becknell cited to no studies that he reviewed, listed no social history and cited an erroneous work history. I find his opinion to be not well documented or reasoned and therefore entitled to little weight. *Clark, supra*.

Dr. Broudy opines that Claimant is totally disabled from a respiratory standpoint. Dr. Broudy's opinion is based upon a review of relevant evidence and accurate social and work histories, and although he opines that Claimant does not have pneumoconiosis, he concludes that he is totally disabled from performing his previous coal mine employment. Dr. Sewell, in a less documented opinion, concludes that Mr. McIntosh is totally unable to work any job. Dr. Sundaram, also in a less documented opinion, concludes that Claimant is totally disabled due to a shortness of breath with limited activity.

Mr. McIntosh has failed to produce valid, qualifying pulmonary function studies and arterial blood gas studies. He has, however, produced three medical opinions asserting that he is totally disabled. Although two of these medical opinions are insufficiently documented and one is based upon an erroneous premise, the absence of pneumoconiosis, they are sufficient to demonstrate total disability by a preponderance of the evidence. There is a single, undocumented, unreasoned, twenty-five year old medical opinion standing for the proposition that he is not totally disabled. However, this single opinion is simply insufficient to rebut the contrary evidence. I therefore find that Mr. McIntosh is totally disabled from a respiratory standpoint.

Total Disability Due to Pneumoconiosis

Unless one of the presumptions at §§ 718.304, 718.305, or 717.306 is applicable, a miner with less than 15 years of coal mine employment, must establish that his or her total disability

is due, at least in part, to pneumoconiosis. The Board has held that "[i]t is [the] claimant's burden pursuant to § 718.204 to establish total disability due to pneumoconiosis . . . by a preponderance of the evidence." *Baumgartner v. Director, OWCP*, 9 B.L.R. 1-65, 1-66 (1986); *Gee v. Moore & Sons*, 9 B.L.R. 1-4, 1-6 (1986). Upon demonstrating that he is totally disabled, Claimant must establish that his total disability is due at least in part to pneumoconiosis. *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Youghiogheny & Ohio Coal Co. v. McAngues*, 996 F.2d 130, 17 BLR 2-146 (6th Cir. 1993), *cert. denied*, 114 S.Ct. 683 (1994); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

Dr. Wicker opined in 1991 that Mr. McIntosh suffered from pneumoconiosis and COPD caused by coal dust exposure, and that he was totally disabled due to the COPD. He provided an inconsistent opinion without explanation in 1998, in which he does not opine as to disability or etiology. I find these conflicting opinions to be of little probative value. *Surma, supra.*

Dr. Broudy opines that Mr. McIntosh's disability is caused by a long history of cigarette smoking, rather than from pneumoconiosis. Dr. Broudy, however, did not diagnose pneumoconiosis. In reviewing the medical opinion evidence regarding etiology, it is noteworthy that an opinion wherein the physician did not diagnose the miner as suffering from pneumoconiosis may be accorded little probative value. *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). In *Tussey*, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this cases arises, held that a physician's opinion, that the miner's total disability was not due to pneumoconiosis, but to cigarette smoking, was of no probative value since the physician did not find that the miner had pneumoconiosis, and the existence of pneumoconiosis was already established by the x-ray evidence. Similarly, in this case, Dr. Broudy found that Mr. McIntosh did not have pneumoconiosis, but found him totally disabled due to his smoking history. In fact, the Respondent has conceded that the miner suffers from pneumoconiosis. Accordingly, I give Dr. Broudy's opinion with regards to the etiology of Claimant's total disability little weight.

Both Drs. Sewell and Sundaram diagnose Mr. McIntosh with coal workers' pneumoconiosis and with total disability. Dr.

Sundaram specifically opines that the etiology of the impairment is prolonged exposure to coal dust. As noted above, Dr. Sundaram's opinion is less than adequately documented, entitling it to less weight, but it is still probative as to the cause of the impairment. See, *Clark, supra.* Dr. Sewell's opinion is in letter form, and does not attribute the impairment specifically to pneumoconiosis. His opinion is therefore equivocal as to whether the cause of the impairment is attributed to his diagnosis of pneumoconiosis or chronic pulmonary disease. An equivocal opinion with regards to etiology is entitled to less weight. *Justice v. Island Creek Coal Co.*, 11 B.L.R. 1-91 (1988).

Weighing the evidence regarding the causation of Mr. McIntosh's impairment, I am faced with Dr. Broudy's opinion, which is entitled to little weight, noting an etiology of cigarette smoking, and Dr. Sundaram's opinion, entitled to just less than full weight, noting an etiology of coal dust exposure. Due to Dr. Broudy's diagnosis of the absence of pneumoconiosis, I find Dr. Sundaram's opinion more persuasive on the issue of causation of impairment. See, *Tussey, supra*. Mr. McIntosh has, therefore, demonstrated by a preponderance of the evidence that he is totally disabled due to pneumoconiosis.

Mr. McIntosh has established a material change in conditions with regards to his prior denial of benefits. Upon review of the entire record, Mr. McIntosh has also demonstrated by a preponderance of the evidence that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§§§718.3, 718.202, 718.203, 718.204. Accordingly, I find that Mr. McIntosh has established entitlement to benefits.

ENTITLEMENT

In the case of a miner who is totally disabled due to pneumoconiosis, benefits commence with the month of the onset of total disability. Where the evidence does not establish the month of the onset of total disability, benefits begin with the month during which the Claimant filed his application for benefits. *Lykins v. Director, OWCP,* 12 BLR 1-181 (1989). Based upon my review of the record and the limited evidence provided, I cannot determine the month that Claimant became totally disabled due to pneumoconiosis. Consequently, Mr. McIntosh

shall receive benefits commencing January 1998, the month during which this duplicate claim was filed.

ORDER

The Director is ordered to pay:

1. To the Claimant, all benefits to which he is entitled under the Act augmented by reason of his one dependent described above, commencing on January 1, 1998.

2. To the Claimant, all medical and hospitalization benefits to which he is entitled commencing on January 1, 1998, or otherwise provide for such service.

A
Rudolf L. Jansen
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington D.C. 20013-7601. A copy of this Notice of Appeal also must be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20210.